

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(3)I
Income Tax
June 18, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I081119A

On November 19, 2008 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether royalty income that he received while a nonresident of New York State constituted income derived from New York sources. The royalty payments were income from intangible property that was not employed in a business, trade, profession or occupation carried on in the State; therefore, the income is not subject to New York personal income tax. Since Petitioner owes penalty or interest only if he owes tax, his inquiry about penalty and interest is moot.

Facts

Petitioner was employed as a professor at [REDACTED] (University) for a number of years until he retired in 1997. While not required to do so by his employer, Petitioner conducted research. This research resulted in his discovery of a treatment for glaucoma, which he patented. Petitioner was not obligated to advise his employer of discoveries resulting from his research nor was he obligated to transfer to his employer any patents resulting from his research. In 1982 Petitioner assigned all his rights to the patent to University in exchange for a portion of the royalties that the University would collect. Petitioner's assignment of his patent to University was voluntary; the University had no legal claim to the patent as Petitioner's employer. In 1996 the patent was marketed and Petitioner began to receive royalty payments.

Petitioner was a resident of New York State while he was employed by University. In 1998 he became a nonresident of the State. He did not file New York State personal tax returns for the years 1999 through 2005.

Analysis

Tax Law §631(a)(1) provides that the New York adjusted gross income of a nonresident individual shall include, among other items, the sum of the net amount of items of income, gain, loss, and deduction entering into his or her federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources.

The New York adjusted gross income of a nonresident individual rendering personal services as an employee includes the compensation for personal services entering into his Federal adjusted gross income, but only if, and to the extent that, his services were rendered within New York State. 20 NYCRR 132.4(b). Not all payments made by an employer to an employee constitute remuneration for services performed by an employee. For example, royalties paid by a business for the license of a patent held by an employee do not constitute wages if the license contract is separate and distinct from the employment contract. *Rev Ruling 68-499, 1968-2 C.B. 421*. Further, not all scholarly research performed by an academician is required by or for the benefit of the academician's employer. *Matter of Morton Davis*, State Tax Commission, December 24, 1982, TSB-H-82(334)I. Since Petitioner's research was not required by or for the benefit of University, as evidenced by the University's lack of a legal claim to the intellectual property created by Petitioner's research, the royalties Petitioner received from University did not arise from an employment relationship. Consequently, the payments did not constitute remuneration for services performed by an employee.

Items of income, gain, loss and deduction "derived from or connected with New York sources" include those that are attributable to a business, trade, profession or occupation carried on in New York or income from intangible personal property to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in New York (*see* Tax Law §631[b][1][B] and [b][2]). A business, trade, profession, or occupation is carried on within New York State by a person who occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such person's affairs are systematically and regularly carried on. 20 NYCRR 132.4. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. *Id.* Petitioner's performance of research science in the State did not constitute the conduct of a profession in the State; therefore, the assignment of the patent resulting from his research was not attributable to a profession carried in New York. Nor did Petitioner, after he became a nonresident, "[employ] in a business, trade, profession, or occupation carried on in" New York the intangible property that entitled him to royalty payments. Accordingly, the royalty payments that accrued to him after he became a nonresident were not New York source income.

Because Petitioner owes no New York income tax on his royalty income received as a nonresident, the questions as to penalty and interest are moot.

DATED: June 18, 2010

/S/

Jonathan Pessen
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific & F, April 8, 1994, TSB-A-94(7)I. Therefore, the trusts' income is not subject to New York income tax. time period at issue in the Opinion.